No. 277

JOHN T.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

DISTRICT OF COLUMBIA, *Petitioner*,

v.

FENTON M. FADELEY, RICHARD W. FADELEY, F. MERCER FADELEY, FENTON M. FADELEY, PATRICK A. DECK, CHESTER A. BLINSTON, AND DOLORES U. FADELEY, *Respondents*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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No. ———

DISTRICT OF COLUMBIA, *Petitioner,*

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FENTON M. FADELEY, RICHARD W. FADELEY, F. MERCER FADELEY, FENTON M. FADELEY, PATRICK A. DECK, CHESTER A. BLINSTON, AND DOLORES U. FADELEY, *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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The District of Columbia, a municipal corporation, through its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cases on June 7, 1956.

OPINIONS BELOW

The opinions of the District of Columbia Tax Court (R. 119-130; R. 169-194) are not reported. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 1-7) is reported at —— F. 2d ——.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals (Appendix A, *infra*, p. 8-10) was entered on June 7, 1956.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Sec. 4, Title IX, District of Columbia Revenue Act of 1937, as added by Sec. 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223 (Sec. 47-2404, D. C. Code, 1951).

QUESTIONS PRESENTED

1. Four of the respondents herein, having been assessed District inheritance taxes, appealed to the District of Columbia Tax Court. The only issue raised in such appeals was the correct value of the interests transferred from the decedent to the respondents (R. 147). This issue was decided against respondents by the Tax Court (R. 179). The Tax Court did not, however, make either a finding of fact or a conclusion of law, or enter a decision, on such determination. After trial of the issue respondents moved to amend their petitions to raise a new issue (R. 148) to the effect that if the decedent made a lifetime transfer of her partnership interests to respondents she did so as the result of a "bona fide purchase for full consideration in money or money's worth" (R. 151). The Tax Court granted the motion (R. 148) over the District's objections (R. 196), stating as reason therefor that "substantial justice requires that petitioners [respondents here] be given the opportunity to present the question of full consideration" (R. 150). Six days later, without waiting for the District's answers to the amended petitions, the Tax Court entered its findings of fact, opinion and decisions (R. 196, 199, 202, 205). Although the Tax Court's governing statute, *infra*, specifically requires that the Tax Court "shall hear and determine all questions arising" on appeals to it "and shall make separate findings of fact and conclusions of law" and shall render its decision thereon, *no*

hearing was held on the new issue, nor did the Tax Court make the requisite findings of fact and conclusions of law on such issue. Nevertheless, the Tax Court entered decisions in favor of the respondents holding the assessments erroneous and authorizing tax refunds (R. 194, 206-208), and the Court of Appeals affirmed such action (Appendix A, *infra,* p. 7).

The question presented under these circumstances is:

Was the District of Columbia, petitioner, deprived of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

2. Whether the lower Courts had jurisdiction over the remaining three cases under a statute which authorizes appeals to the District of Columbia Tax Court only by a person aggrieved by an assessment of taxes against him, provided such person first pays the tax, where the persons against whom the taxes were assessed did not pay the taxes and where another person, who paid the taxes, had not been assessed such taxes?

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States of America, Vol. 1, U.S. Code, p. XLIV:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTES INVOLVED

Section 1(a) and Section 1(h) of Article I, Title V, of the District of Columbia Revenue Act of 1939, 53 Stat. 1111, ch. 367 (Sec. 47-1601, D. C. Code, 1951):

"Taxes shall be imposed in relation to estates of decedents, the shares of beneficiaries of such estates, and gifts as hereinafter provided:

> "(a) All real property and tangible and intangible personal property, or any interest therein, having its taxable situs in the District of Columbia, transferred from any person who may die seized or possessed thereof, either by will or by law, or by right of survivorship, and all such property, or interest therein, transferred by deed, grant, bargain, gift, or sale (except in cases of a bona fide purchase for full consideration in money or money's worth), made or intended to take effect in possession or enjoyment after the death of the decedent, or made in contemplation of death, to or for the use of, in trust or otherwise (including property of which the decedent has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from such property or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom), to the father, mother, husband, wife, children by blood or legally adopted children, or any other lineal descendents or lineal ancestors of the decedent, shall be subject to a tax as follows: * * *"
>
> [Here follow the rates of tax.]
>
> "(h) The transfer of any property, or interest therein, within 2 years prior to death, shall, unless

shown to the contrary, be deemed to have been made in contemplation of death."

Sections 2 and 3 of Article I, Title V, of the District of Columbia Revenue Act of 1939, *supra* (Secs. 47-1602 and 47-1603, D.C. Code, 1951), in material part as follows:

"2. The tax provided in section 1 shall be paid on the market value of the property or interest therein at the time of the death of the decedent as appraised by the assessor, or, in the discretion of the assessor, upon the value as appraised by the probate court of the District. * * *

"3. The appraisal thus made shall be deemed and taken to be the true value of the said property or interest therein upon which the said tax shall be paid, * * *."

Sections 3 and 8 of Title IX of the District of Columbia Revenue Act of 1937, as amended, 52 Stat. 371, 374, ch. 223, as amended (Secs. 47-2403 and 47-2408, D.C. Code, 1951), as follows:

"3. Any person aggrieved by any assessment by the District against him of any personal-property, inheritance, estate, business-privilege, gross-receipts, gross-earnings, insurance-premiums, or motor-vehicle-fuel tax or taxes, or penalties thereon, may, within ninety days after notice of such assessment, appeal from such assessment to the board, provided such person shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia. The mailing to the taxpayer of a statement of taxes due shall be considered notice of assessment with respect of such taxes. The board

shall hear and determine all questions arising on said appeal and shall make separate findings of fact and conclusions of law, and shall render its decision thereon in writing. The board may affirm, cancel, reduce, or increase such assessment."

* * * * * * *

"8. The board shall adopt and promulgate rules of procedure in matters for determination by the board under the provisions of this title."

COURT RULES

The following rules of procedure promulgated by the District of Columbia Tax Court are applicable:[1]

"Rule 9—Answer.—(a) Every material allegation of fact set forth in the petition shall be deemed to be denied by the District; and no answer shall be required, except when the District shall rely upon new and affirmative matter of defense, or when the District seeks an increase of the assessment, in either of which events an answer shall be filed clearly and concisely stating such new and affirmative matter or the grounds upon which the District relies for such increase of assessment. One original and 2 conformed copies of the answer shall be filed with the Clerk. The Clerk will serve a copy of the answer upon the petitioner or his attorney.

"(b) The answer and any motion to dismiss based on the contention that the petition fails to state facts upon which relief can be granted, shall be filed within 20 days after the date of service of

[1] These rules may be found in the District of Columbia Tax Reports published by Commerce Clearing House, paragraphs 13-801-13, 835, inclusive.

a copy of the petition on the assessing authority and Corporation Counsel, or such motion may be made at the hearing."

"Rule 10—Joinder of Issue.—A proceeding is deemed at issue upon the filing of an answer by the District, or upon the expiration of the time allowed for the filing of an answer, whichever shall first occur."

"Rule 11—Amended and Supplemental Pleadings.—(a) The petitioner may amend his petition at any time within 20 days after the filing thereof, except where an answer has been filed. After answer is filed, or after 20 days after the date of filing the petition, if no answer is filed, a petition may be amended only by consent of the District or on leave of the Board. An answer may be amended only by consent of petitioner or on leave of the Board.

"All motions to amend, made prior to the hearing, must be accompanied by the proposed amendments or amended pleadings.

"(b) When issues not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after decision; but failure so to amend does not affect the result of the decision of these issues. If evidence is objected to at the hearing on the ground that it is not within the issues made by the pleadings, the Board may allow the pleadings to be amended.

"(c) When motions to amend are granted at the hearing, the amendment or amended pleading shall

be filed at the hearing or with the Board within such time as the Board may fix."

* * * * * * *

"Rule 34—Findings of Fact and Conclusions of Law. In any proceeding before the Court the findings of fact may be either in numbered paragraphs or in narrative form; and the conclusions of law, either may be stated separately in numbered paragraphs or may be incorporated in the opinion of the Court. This rule shall become effective as of November 12, 1952."

STATEMENT

This case resulted from appeals filed by six persons with the District of Columbia Tax Court from assessments of District inheritance taxes. Four of the assessments were made against Fenton M. Fadeley, Patrick A. Deck, Chester A. Blinston and Dolores U. Fadeley, survivors of a business partnership of which said survivors and Ellen H. Fadeley (the decedent) were the owners (R. 168, 169).

The taxes in question were assessed against the four surviving business partners of the decedent to whom was transferred, under self-executing provisions of the partnership agreement and as a result of the decedent's death, that portion of the decedent's interest in the partnership business which exceeded the decedent's capital account in such business. The partnership agreement did not recite any consideration but required each partner to keep a capital account at all times of at least $1,000 for every percent of partnership interest (R. 214). There was no provision in the agreement (R. 213-219) giving any partner an option to purchase, or for the sale of, any partner's interest upon death or withdrawal; but there was provision as follows (R. 217): "It is agreed that no partner will ever

assign or commit any part of his net worth without the voted permission of the rest of the partners." The agreement provided (R. 215) that at the death of any partner the estate of that partner would remain a partner to the end of that calendar year, at which time the partner's capital account would be credited with the partner's full profit for the year, and the capital account would become the property of the executors, with provision for a reserve left on deposit to cover contingent liability for one year. The agreement further provided (R. 215):

> "At the end of the year in which occurs the death of E. H. Fadeley [the decedent], the remaining partners, including any future added partners who, at their selection, must likewise agree to this and additional death provisions mentioned hereafter, hereby agree to reform the three partnerships with profits distributed in the same manner except that to each of the living original partners' percentage will be added the portion of 22-2/3% [the decedent's partnership interest] arrived at by dividing it equally among the other living original partners. (If P. A. Deck, C. A. Blinston, D. U. Fadeley and F. M. Fadeley are all living at that time, to each would be added 5-2/3%)"

There was no provision in the agreement for the decedent to receive a portion of the interest of any other partner who might have predeceased her. The Tax Court recognized this but stated (R. 190): "This, no doubt, was due to somewhat uncanny prescience or belief that she would be the first to die."

The decedent's partnership interests were transferred after the decedent's death as follows (R. 164-166):

Interest Transferred	*Market Value of Interest*
Decedent's capital account (including added profits, interest and capital gain after December 31, 1952), transferred to decedent's estate ..	$108,117.95
Remainder, transferred to respondents F. M. Fadeley, the latter's wife D. U. Fadeley, P. A. Deck and C. A. Blinston, surviving partners	$103,587.68
Total market value of interests transferred, as appraised by the Assessor pursuant to Sec. 2 of Article I, Title V, of the District of Columbia Revenue Act of 1939, *supra*, and as approved by the District of Columbia Tax Court (R. 179)	$211,705.63

The respondents F. M. Fadeley, D. U. Fadeley, Deck and Blinston paid the taxes assessed against them (R. 168) and appealed to the Tax Court where the only issue raised by such appeals was that of the valuation of the partnership interests transferred, specifically so determined by the Tax Court after full consideration of the matter as follows (R. 147):

> "THE COURT: The point of this is this—and I looked through the petitions, and studied them very carefully, and I can find no assignment of error which would cover that. The three assignments of error relate, as I see it, to valuation only, and the facts relate to valuation. There is mention to the agreement in the facts."

The sole issue, which related to valuation of the interests transferred, was decided against the respondents by the Tax Court (R. 179) but the Tax Court did not make a

finding of fact or a conclusion of law on such determination, or enter a decision in respect thereof. Instead, the Tax Court granted a motion (R. 148), over the District's objections (R. 196), permitting the respondents to amend their petitions after trial (R. 148) to allege the following new error in the assessments (R. 151):

> "5.k. If Ellen H. Fadeley [the decedent] made a lifetime transfer of her partnership interests, she did so as the result of a bona fide purchase for full consideration in money or money's worth including the mutual covenants and agreements contained in the partnership agreement."

In granting such motion the Tax Court stated (R. 150):

> "The Court believes that substantial justice requires that the petitioners [respondents here] be given the opportunity to present the question of full consideration, and for that reason the Court will grant the motion for leave to amend and direct that the amendments attached as exhibits to the motion will be received and filed by the Clerk as a pleading in these cases."

The amendments brought into focus that provision of Section 1(a) of the taxing statute, *supra,* which imposes District inheritance taxes on all transfers of property from decedents made "by deed, grant, bargain, gift, or sale (except in cases of a bona fide purchase for full consideration in money or money's worth)." The questions thus presented were wholly unrelated to the issue. Such questions necessitated the taking of evidence and the making of separate findings of fact and conclusions of law thereon, under the Tax Court's governing statute [2] on the following:

[2] Sec. 3 of Title IX of the District of Columbia Revenue Act of 1937, as amended, *supra.*

(1) Whether the decedent made a lifetime transfer of her partnership interests.

(2) Whether, if such a lifetime transfer was made, the transfer was "a bona fide purchase."

(3) Whether, if a bona fide purchase, the transfer was "for full consideration in money or money's worth."

(4) Whether the respondents had exhausted their administrative remedies by presenting these questions to the Assessor for decision prior to appeal to the Tax Court.

Although the Tax Court's governing statute, *supra*, plainly requires that the Tax Court "shall hear and determine all questions arising" on appeals to it, "and shall make separate findings of fact and conclusions of law," and "shall render its decision thereon," no hearing or proceedings of whatsoever nature were held on the new point permitted to be raised, no evidence therefore was presented or received thereon, nor did the Tax Court make the requisite findings of fact and conclusions of law. Six days after granting the aforesaid motion to amend, without waiting for the District's answers, if any, to the amended petitions, the Tax Court entered its findings of fact, opinion and decisions (R. 196, 199, 202, 205), holding the assessments against respondents to be erroneous and authorizing tax refunds. The Court of Appeals affirmed such action (Appendix A, *infra*, p. 7).

The taxes involved in the remaining cases were assessed after it was determined by the Assessor of the District that two gifts made by the decedent within two years prior to her death to her grandsons, Richard W. Fadeley and F. Mercer Fadeley, were made in contemplation of death under Section 1 (h) of the tax statute involved, *supra* (R. 118, Finding 23). The inheritance taxes were assessed against the donees, Richard W. Fadeley and F. Mercer

Fadeley but were not paid by them. Such taxes were paid by their father, Fenton M. Fadeley. (R. 95, Finding 1; R. 118, Findings 23, 24.) Sec. 3 of Title IX of the District of Columbia Revenue Act of 1937, as amended, *supra* (the Tax Court's governing statute), permits only a "person aggrieved" by an assessment "against him" to appeal from the assessment, provided *such person* shall "first pay such tax." Notwithstanding that these clear requirements of the statute were not complied with, the Tax Court assumed jurisdiction of the appeals to it by the donees, against whom the taxes were assessed, as well as of the appeal to it by Fenton M. Fadeley, father of the donees, who paid the taxes, but against whom such taxes had not been assessed. The Tax Court ignored the jurisdictional requirements of its governing statute and entered a consolidated decision (R. 130, 131) holding that the taxes involved were erroneously assessed against Richard W. Fadeley and F. Mercer Fadeley, and that Fenton M. Fadeley is entitled to a refund of such taxes. The Court of Appeals affirmed such action (Appendix A, *infra*, p. 7).

REASONS FOR GRANTING THE WRIT

1. This case is of greater importance than *District of Columbia* v. *Pace*, 320 U.S. 698, decided January 10, 1944, which this Court considered and decided because the scope of review of decisions of the Board of Tax Appeals for the District of Columbia (now known as the District of Columbia Tax Court) was important to the administration of the District's tax laws. This case not only embraces the scope of review of the Tax Court's decisions but also, and most important, whether failure of the Tax Court to conduct the hearing required by statute and to make findings of fact and conclusions of law, and to render its decisions on such findings of fact and conclusions of law as required by the Tax Court's governing statute, violates due process of law secured by the Fifth Amendment to

the Constitution of the United States. Although this question was raised and presented in the Court of Appeals (Appendix B, *infra*, p. 12, 13), that Court ignored the District's contention that the Tax Court's procedure, and lack of it, in these cases resulted in deprivation of property without due process of law secured by the Fifth Amendment to the Constitution of the United States. Section 3 of the Tax Court's governing statute, *supra* (p. 5, 6), specifically requires that Court to "hear and determine" all questions arising on appeals before it and to make "separate findings of fact and conclusions of law" and to render its decision "thereon". The amendments of the appeals to the Tax Court, permitted to be made by the Tax Court after trial of the cases, presented new questions upon which evidence was required to be taken. No hearing was held and, consequently, no evidence was taken. The new questions arising from the amendments permitted by the Tax Court required findings of fact and separate conclusions of law as to whether the decedent made a lifetime transfer of her partnership interests to the decedent, whether such a transfer, if made, was a "bona fide purchase", whether the transfer was, if a bona fide purchase, "for full consideration in money or money's worth" and, also, whether the respondents had exhausted their administrative remedies on these questions before the assessing authorities. No such findings of fact were made, and none could have been properly made, because the required hearing had not been held. The Tax Court's governing statute not only gives but requires a full hearing on questions before that Court which confers upon the parties the privilege of introducing evidence and, at the same time, imposes upon the Tax Court the duty of deciding such questions in accordance with the facts proved. The essential elements of due process of law are an opportunity to be heard and to defend in an orderly proceeding. Denial of these substantial rights to the District in these cases

clearly constitutes a deprivation of property without due process of law. In *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Co.*, 227 U.S. 88, in which the foregoing principles were set forth, this Court stated (p. 91):

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.'"

To the same effect see *Morgan* v. *United States*, 304 U.S. 1; *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292, 300; and *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123.

This Court has further stated in *Hovey* v. *Elliott*, 167 U.S. 409, 414, that to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

The Court of Appeals justifies its action in affirming the Tax Court's decisions on an opening statement made by counsel for respondents in the Tax Court that "if a transfer of decedent's partnership interests did occur, it occurred when the partnership agreements were drawn up and it was made for a valuable consideration"; that although this point was not raised in the respondents' appeals to the Tax Court, the Tax Court, *after the hearing*, granted the respondents' motions to amend their petitions to include "this consideration argument"; that the Tax Court observed that the respondents had urged "the con-

sideration argument" in the opening statement without objection by the District; that the issue was discussed in their brief; and that the partnership agreements which were the only evidence necessary to support *this argument* were received in evidence without objection (Appendix A, *infra*, p. 6). Cases are to be tried on the issues raised and the facts adduced in respect thereof. The District, in its brief, as the Tax Court pointed out (R. 150), "did not reply to the argument" on consideration. Of course no reply was necessary or proper because the point was not before the Tax Court and had not been heard by that Court. This is amply clear from the discussion on the matter on August 9, 1955, after the hearing on the issue of valuation (R. 141-147), during the course of which counsel for the District stated (R. 144-145): "I wanted to make our position clear here. There has never been any indication on the part of the District, as indicated by counsel for the petitioners, that we were trying any issues that were not raised in the petition in this case * * *." Thereafter at the conclusion of the aforesaid conference, the Tax Court, itself, concluded that even the alleged issue of "valuable consideration" referred to in the Court of Appeals' opinion (App. A, p. 6) and by the Tax Court during the conference (R. 146) had not been raised (R. 147). No issue is presented in any case under the District inheritance tax law, which excludes transfers from decedents "in cases of a bona fide purchase for full consideration in money or money's worth", merely by the assertion in an opening statement that a "valuable consideration" was paid "if a transfer did occur". There is no question in these cases that a transfer did occur from the decedent to the respondents after, and as a result of, the decedent's death and then only because the decedent's death brought to fruition the provisions, testamentary in character, contained in the agreement and

quoted, *supra* (p. 9). The assertion by the District of Columbia Tax Court (R. 150), adopted by the Court of Appeals (Appendix A, *infra*, p. 6), that the partnership agreement was the only evidence necessary to support the respondents' contention that a "valuable consideration" had been paid, not only does not meet the question presented but is patently erroneous, since it is obvious that the partnership agreement, while it might present some evidence on the question presented, could not preclude the possibility of other and better evidence bearing upon it. These are matters of evidence which should have been, but were not, presented to and considered by the Tax Court because no hearing was held on the questions by that Court.

2. The Court of Appeals, in Footnote 8 of its opinion (Appendix A, *infra*, p. 6), states that there is no support for the District's argument that the Tax Court could not consider points which were raised in the respondents' opening statement and in their brief and which were included in amended petitions, citing as authority therefor Rule 11 of the Rules of Procedure before the Tax Court, *supra*, which permits amendment "to make the pleadings conform to the evidence". The District did not contend before the Court of Appeals that the Tax Court could not consider a point raised by an amendment filed pursuant to the Tax Court's Rule 11. The District's contention in this respect is restated herein, quoted from the District's brief filed in the Court of Appeals (p. 60 of that brief):

> "The first clear error committed by the Tax Court was granting respondents' motions to amend at such late date. There is no authority under the Tax Court's rules of procedure for amendment of pleadings to raise new issues after trial except under Rule 11(b) which provides that

> when issues not raised by the pleadings are "tried by express or implied consent of the parties" they will be treated in all respects as if they had been raised in the pleadings, and that the pleadings may be amended at any time, on motion, to raise these new issues. The motion for leave to amend, filed by respondents August 23, 1955 (J.A. 147), to raise the new issue (J.A. 150, 151) did not assert that the proposed amendments were intended to raise a new issue which had been tried by express or implied consent and, in fact, could not have given such a reason because neither the Tax Court nor counsel for the District had any such understanding (J.A. 144, 145) as late as August 9, 1955, after trial of the cases. * * *"

The contentions of counsel for the District on this matter before the Court of Appeals were summed up on pages 9 and 10 of the District's reply brief, as follows, which we adopt herein:

> "Under this posture of the cases, wholly aside from any question whether the Tax Court properly permitted the amendments referred to, it was mandatory under Sec. 47-2403, D.C. Code, 1951, that the Tax Court 'hear and determine' the new question thus raised in the appeals pending before it in the manner prescribed in the statute. At such a hearing it would have been obligatory upon respondents to show by a preponderance of evidence that, as between them and the decedent, there had been 'a bona fide purchase for full consideration in money or money's worth' to bring the transfers here involved within the exempting

clause of Sec. 47-1601, D.C. Code, 1951; and, at such a hearing, the District would have been entitled to rebut such evidence by evidence of its own, as well as to show that the respondents had not exhausted their administrative remedies as required by law. No hearing of whatsoever nature was held by the Tax Court on the new issue it permitted to be raised after trial (District Brief, pp. 22, 62, 63), yet the Tax Court determined the question (1) by holding that the Assessor's appraisal of market value, as required by statute, which included the value of the interests transferred to the respondents herein, had not been overcome and should not be disturbed, and (2) by holding erroneous the assessments made and authorizing tax refunds to the respondents. Such procedure clearly does not comply with the Constitutional requirement of due process of law under the Fifth Amendment to the Constitution of the United States."

3. The District further contended before the Court of Appeals that the Tax Court's decisions were erroneous because that Court did not make proper findings of fact and separate conclusions of law as required by law (Appendix B, *infra*, p. 12). The Court of Appeals disposed of the District's contentions in these respects by stating that such contentions ignored the fact that "no statute or rule dictates any rigid formula for findings of fact, conclusions of law and opinions" (Appendix A, *infra*, p. 7). Section 3 of the Tax Court's governing statute, *supra* (p. 5, 6), specifically requires that Court to make "separate findings of fact and conclusions of law". This, the Tax Court did not do. It entered findings of fact and an opinion (R. 151-194). The Judge of the Tax Court, in failing to make separate findings of fact and conclusions

of law as required by statute, purports to act under a new rule adopted November 12, 1952 (Rule 34, *supra*), which provides that conclusions of law may be stated separately in numbered paragraphs or may be incorporated in the opinion of the Court. The District would not feel aggrieved, nor consider that the Tax Court had failed to comply with its governing statute relating to conclusions of law if that Court had incorporated conclusions of law, separately stated as required, in its opinion, so that it could be known precisely what the Court's conclusions of law were. This it did not do. Section 8 of the Tax Court's governing statute, *supra* (p. 6), authorizes that Court only to promulgate "rules of procedure". Its Rule 34, *supra*, adopted November 12, 1952, is not a rule of procedure; it is an attempt to nullify plain and unambiguous statutory requirements designed to secure to the respective parties in tax cases orderly due process of law so that they may be adequately apprised of the specific findings of fact and conclusions of law and thus be enabled to present their grievances, if any, to the Court of Appeals for review of the Tax Court's decisions. A rule adopted either by an adminstrative agency or by a Court must not contravene a statute, and any rule so adopted which conflicts with statutory provisions is without force. *Johnson* v. *Manhattan R. Co.*, 289 U.S. 479; *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430; *Steinmetz* v. *Allen*, 192 U.S. 543, 565.

The District also attacked on review in the Court of Appeals such findings of fact as were made by the Tax Court in these cases because they were, for the most part, merely quotations from testimony and exhibits (see R. 95-118 and R. 152-169). The Tax Court's procedure in reciting the evidence in its findings was in direct conflict with the decision of the Court of Appeals below in *Bishop* v. *United States*, 96 U.S. App. D.C. 117, 223 F. 2d 582, decided February 18, 1955, holding that a trial judge

should not recite the evidence upon which he bases a finding, as well as in conflict with the decision of the Second Circuit in *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.* (CCA 2, 1942), 126 F. 2d 992. Other decisions of the Court of Appeals below were not followed in deciding these cases, notably, *Rice et al.* v. *United States,* 85 U.S. App. D.C. 404, 179 F. 2d 26; *Larsen* v. *Marzall,* 90 U.S. App. D.C. 260, 195 F. 2d 200; *American Broadcasting Co.* v. *Federal Communications Commission,* 85 U.S. App. D.C. 343, 179 F. 2d 437; *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 68 App. D.C. 282, 96 F. 2d 554, cert. denied 305 U.S. 613. The decision of the Court of Appeals in these cases is also in conflict with *Shapiro* v. *Rubens* (CCA 7, 1948), 166 F. 2d 659, holding that failure to find a fact essential to recovery is equivalent to a finding against the party having the burden of proving it; *Woods* v. *Turner* (CCA 10, 1949), 172 F. 2d 313, holding that the absence of a finding material to the issue presented is equivalent to a finding against the plaintiff having the burden of proof; and *United States* v. *Forness, et al.* (CCA 2, 1942), 125 F. 2d 928, 942, where the Court stated that the judiciary properly holds administrative officers to high standards in the discharge of the fact finding function, and that the judiciary should at least measure up to the same standards.

Furthermore, the Tax Court and the Court of Appeals, in deciding these cases solely on the partnership agreement, without other material evidence, followed a wholly inapplicable principle of Federal estate tax law that where a decedent has given an option to sell at a specified price *the value of a decedent's interest in an entity can be included in his gross estate at no more than the option price.* This was the principle established in *Wilson* v. *Bowers* (CCA 2, 1932), 57 F. 2d 682, followed by the Tax Court (R. 193), which was applied by the Federal Tax Court in *Bensel* v. *Commissioner,* 36 B. T. A. 246, on which the

Court of Appeals relied (Appendix A, *infra*, p. 7). *In the partnership agreement here involved there was no option to buy or sell any partner's interest at a specified price* upon death or withdrawal of a partner. Insofar as the decedent was concerned, the surviving partners (the respondents) took all of her partnership interest after her death in excess of her capital account *without payment of any amount whatever* to her estate.[3] The *valuation question* in these cases was decided against the respondents, as pointed out *infra*. Thus the decision of the Court of Appeals even in this respect is in conflict with decisions of other Federal courts thereon.

The conflicts above set forth are important to administration of Federal and District tax laws and should be resolved by this Court.

5. The decision of the Court of Appeals on the matter of whether the Tax Court had jurisdiction over the three remaining cases is contrary to law, contrary to prior decisions of the Court of Appeals on the jurisdictional point, and contrary to the decisions of this Court. Jurisdiction is a matter of power, and when a case is not within the law it is not within the jurisdiction of the Court. *Lamar* v. *United States*, 240 U.S. 60, 64. Section 3 of the Tax Court's governing statute, *supra* (p. 5), authorizes an appeal from any inheritance tax assessment by any person aggrieved by such an assessment *against him*, provided *such person* shall first *pay such tax*. The persons assessed did not pay such taxes. Therefore, the Court of Appeals stated in Footnote 4 of its opinion (Appendix A, *infra*, p. 4) they "should not be allowed to appeal the assessment". Yet the Court of Appeals affirmed the decision of the Tax Court in those appeals holding the assessments erroneous.

[3] The only obligation each surviving partner had was to keep a capital account at all times of at least $1,000 for every percent of partnership interest (Statement of the case, *supra*, p. 8).

In permitting the residuary legatee under the will to maintain an appeal and recover the taxes assessed against the donee-grandsons of the decedent, the Court of Appeals took the view that although "the tax was technically not assessed against the residuary legatee, for all practical purposes the assessment was against him and, therefore, he can appeal under this statute" (Appendix A, *infra*, p. 4). The Court of Appeals ignored the fact that the assessments involved were made against the donees for *inter vivos* transfers from the decedent to them which were thereafter specifically excluded from the decedent's will by codicil (R. 115, 116, Finding 21) and, consequently, the residuary legatee's share of the estate could not have been reduced by the amounts of the taxes because neither the decedent's estate nor the residuary legatee was liable for such taxes. The Court of Appeals referred to *National Bank of Washington* v. *District of Columbia*, 96 U.S. App. D.C. 395, 226 F. 2d 759, (Appendix A, *infra*, p. 4) wherein it had held that an executor is not a "person aggrieved" for purposes of an appeal to the Tax Court unless the "estate as a whole" is directly affected and "liable for the tax," and came to the conclusion that, under the District's contention, the result would be that where a will provides for the payment of succession taxes out of the corpus of the estate, *no one* can appeal an assessment to the Tax Court under the statute involved (Appendix A, *infra*, p. 3). Such a result could not exist because (1) if the estate is liable for the taxes in any case the executors, under *National Bank of Washington* v. *District of Columbia, supra*, could maintain an appeal, and (2) individual beneficiaries can maintain appeals to the Tax Court by following the procedure prescribed by the statute. Private arrangements between persons as to payment of inheritance taxes assessed certainly cannot under the statute, and the decision of the Court of Appeals in these cases ought not, permit tax litiga-

tion in the Tax Court when not authorized.[4] All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them. *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276, 283. To permit the residuary legatee under the will to maintain his appeal from the assessments made against the *inter vivos* donees of the decedent in these cases completely disregards the statutory requirements for appeals to the Tax Court and in effect would amend the Tax Court's governing statute so as to permit appeals by "any person who pays the tax assessed" without regard to whether such person has been assessed or is liable for the tax. This result is contrary to the decision of the Court of Appeals in *Story* v. *Snyder, et al.*, 87 U.S. App. D.C. 96, 184 F. 2d 454, cert. denied 340 U.S. 866, where the Court stated that it is not within the judicial function to rewrite a statute so that it will authorize what the court thinks should be authorized. Such result is also contrary to *District of Columbia* v. *McFall*, 88 U.S. App. D.C. 217, 188 F. 2d 991, where the Court of Appeals stated that the Tax Court's jurisdictional requirements cannot be ignored.

It is plain from the foregoing that the District has been deprived of due process of law, guaranteed by the Fifth Amendment to the Constitution of the United States, in respect of the taxes assessed, and that other plain errors adversely affecting the District's substantial rights were committed by the Tax Court in making and entering its decisions, and by the Court of Appeals in affirming such decisions, which this Court should correct.

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[4] The common law remedy for recovery of taxes is still available in the District. *Linder* v. *District of Columbia*, (D.C. Mun. Ct. App.), 32A. 2d 540; Sec. 4(c), Act of July 10, 1952, 66 Stat. 546, ch. 649 (Sec. 47-2413(c), D.C. Code, 1951, Supp. III).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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